SERVED: March 19, 1993

NTSB Order No. EA-3848

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of March, 1993

JOSEPH DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. RODOLFO CHIA, JOSEPH DIACO, PATRICIO MANRIQUEZ, and PAUL SEGURA, Respondents.	)	Dockets SE-12961 12962 12963 12964

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, issued on February 23, 1993, granting respondents' motion to dismiss.[1] The law judge dismissed the Administrator's emergency orders suspending, pending reexamination, respondents' mechanic certificates. We grant the appeal, and remand for further proceedings consistent with this opinion.

[1]The initial decision, an excerpt from the hearing transcript, is attached.

The Administrator's orders alleged that reexamination was justified because respondents released an unairworthy DC-8, EL-AJQ, operated by Aerovias Columbianas Ltda and certificated in Liberia. According to the Administrator, when respondents made these airworthiness releases, the aircraft had "long term structural corrosion problems that resulted in rivet heads falling off." Order, ¶ 4.

At the hearing, the Administrator attempted to introduce a videotape of the aircraft. The law judge rejected the tape on the grounds that: 1) it showed numerous equipment defects beyond corrosion and, therefore, was prejudicial; and 2) the quality of the picture was poor and the tape did not clearly show the corrosion. Tr. at 41-42. The Administrator appeals this rejection. The Administrator also contests the law judge's ultimate grant of respondents' motion to dismiss.

We agree with the Administrator on both counts. In granting a motion to dismiss, the law judge must find that the Administrator has failed to present a prima facie case. In Administrator v. Kiscaden, NTSB Order EA-3618 (1992), we stated:

> Prima facie evidence is a question of fact. It is that factual evidence that is sufficiently strong for his opponent to be called upon to answer it. A prima facie case has been made if there is sufficient proof to support a sought finding, **disregarding evidence to the contrary**.

Id. at footnote 4, emphasis added.

In this case, and leaving aside the videotape, the law judge had before him evidence from two FAA inspectors, Messrs. Dole and

Weise. Mr. Dole was specifically qualified as an expert in airworthiness matters, and Mr. Weise was an international aviation safety inspector specializing in inspecting foreign carriers. Both had examined the aircraft and both testified categorically that the aircraft had rivets missing in locations that made the aircraft unairworthy.[2]

Under the applicable standard, to grant the motion to dismiss the law judge had to find that this evidence was not sufficient proof to support the sought unairworthy finding, i.e., that it was not sufficiently strong to require respondents to offer an answer. The law judge failed even to discuss the testimony of these two inspectors. Our review leaves no doubt that it was more than adequate to withstand a motion to dismiss.[3] Accordingly, we reverse and remand for further hearing as

[2]See, e.g., for Mr. Dole, Tr. at 57-58, 61, 65, 72 (corrosion on all four engine cowlings, on pylons, and along wing spars; clusters of rivets with heads popped off indicating corrosion between layers of aircraft's skin; condition is a long term issue and took years to develop); and for Mr. Weise, Tr. at 80, 92-94 (corrosion over pylons, engine areas, and lower surfaces of wings; aircraft was unairworthy when respondents signed off if only because of corrosion and rivet problems).

[3]We note that respondents apparently argued the motion as if the burden of proof was identical to what it would be on the merits, after both the Administrator and respondents presented their evidence. Tr. at 133, emphasis added ("we haven't seen sufficient evidence here to question these men's competence"). As noted, that is not the standard to apply in analyzing a motion to dismiss. And, we remind the parties to keep in mind the type of proceeding and the applicable standard. The Administrator is not attempting to prove a substantive rule violation and need not offer the amount of evidence required to do so. He is, instead, required simply to show that a reasonable basis exists for questioning respondents' qualifications. Administrator v. Norris, NTSB Order EA-3687 (1992) at 4-6 and cases cited there.

necessary to a decision on the merits.[4]

In remanding, we also direct that the videotape be admitted into evidence. Respondents argued that the videotape was prejudicial, as it admittedly showed dangerous equipment defects. The Administrator replied, using as a guide the Federal Rules of Evidence, Rule 403 (see transcript discussion, e.g., at 11-12 and Appeal at 7-8). Under that rule, evidence may be excluded if its value is outweighed by danger of prejudice or confusion by the jury. The same standard does not logically apply to hearing judges. The law judge, we are sure, is more sophisticated about these matters, and is able to separate issues not before him from those that are. Physically removing irrelevant portions of the tape should not be necessary. Furthermore, whether the videotape is persuasive or not is a question that affects the weight it is given, not its admissibility.

Our deadline in this emergency proceeding is April 13, 1993. We, therefore, order that the further hearing we have directed be held within 5 days of service of this decision, that an oral initial decision be issued at the close of the hearing, and that any appeals and replies to that decision be received by the Board within 4 and 6 days, respectively, of issuance of that initial decision. No extensions will be granted absent respondents'

[4]We are especially concerned with the law judge's conclusion in light of respondents' admissions. Counsel for the Administrator paints a picture of an airline routinely ignoring airworthiness issues and respondents as "guys [who] wanted to keep their jobs" (Tr. at 28), certifying airworthiness as a ministerial course so that paperwork was complete.

agreement to waive the emergency.[5]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The initial decision is reversed; and

3. This proceeding is remanded to the Office of Administrative Law Judges for further action consistent with this decision.

VOGT, Chairman, COUGHLIN, Vice Chairman, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member LAUBER did not participate.

[5]We remind the law judge that, for just the reasons demonstrated here, we encourage the completion of hearings, so that the full record is made.